# Office of Public Utility Counsel

P.O. Box 12397
Austin, Texas 78711-2397
(Tel.) 512/936-7500 • (Fax) 512/936-7520

Suzi Ray McClellan
Public Counsel




April 22, 1997



Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Suite 222
Washington, DC 20554

Re: *Usage of the Public Switched Network by Information Service and Internet Access Providers*
CC Docket 96-263

Dear Mr. Caton:

Enclosed are the original and 17 copies of the Texas Office of Public Utility Counsel's Reply Comments in the above-referenced docket. Please return a file-stamped copy of these comments in the enclosed envelope.

Thank you for your assistance in this matter.

Respectfully,

Gabriel Garcia
Assistant Public Counsel

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Enclosure

**Before the**
**FEDERAL TELECOMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| **In the Matter of** | § | |
| | § | |
| **Usage of the Public Switched** | § | **CC Docket No. 96-263** |
| **Network by Information Services** | § | |
| **and Internet Access Providers** | § | |

## REPLY COMMENTS OF THE TEXAS OFFICE OF PUBLIC UTILITY COUNSEL

The Texas Office of Public Utility Counsel (TOPUC), representing the interests of residential and small commercial consumers in the state of Texas, respectfully submits the following reply comments in response to the Commission's Notice of Inquiry (NOI) regarding usage of the public switched network (PSN) by information services and Internet service providers.

### I. Summary Points

* The Commission should not allow excessive regulation of "enhanced services" to stand in the way of the continued development of the Internet and other interactive computer services.

* From the consumer's perspective, it is disingenuous for those parties who are providing or planning to provide Internet services to advocate for the elimination of the ESP exemption because the exemption is transparent to all Internet Service Providers (ISPs), and lowers the cost of providing Internet service. Elimination of the exemption would only serve to harm the small providers, who are predominately the independent ISPs, and consumers in general who would pay higher rates.

* TOPUC agrees with the conclusions of the study by Economics and Technology, Inc (ETI), *The Effect of Internet Use on the Nation's Telephone Network,* January 22, 1997:

(1) Data communications traffic poses no significant threat to network integrity at the present time.

(2) The increase in data communications traffic has produced additional revenues for the local exchange carriers that far exceed their costs in accommodating that traffic.

(3) The long-term solution for accommodating increased data traffic lies in the stimulation of competition and in the deployment of appropriate data-friendly network technologies, and not in the imposition of per-minute "access charges" for use of the current voice-oriented circuit-switched network.

* To the extent that Internet traffic may lead to congestion in certain switches, it is the responsibility of the incumbent local exchange companies (ILECs) to deal with this potential problem and maintain the reliability of the public switched network (PSN). The ILECs are being compensated for the increased data traffic flowing through the PSN.

* The Commission should ensure that its actions result in fair and equitable access to the Internet for all consumers given the increasingly positive role that the Internet is playing in advancing social and political discourse in the United States.

## II. Introduction

*The convergence of computers and telephone, of broadcast and telephony, of basic and enhanced services, of local and interstate services will continue so long as the underlying technology continues to develop. Each important new technological development will be found to run afoul of some old regulatory line. The question each time will be whether it is technology or regulation that must give way.*

Federal Telecommunications Law
Kellogg, Thorne & Huber[1]

The Commission issued its NOI because the explosive growth of the Internet is, in the words of Kellogg, et al., the latest "important new technological development ... to run afoul of some old regulatory line", in this case the exemption for Enhanced Service Providers

[1] Michael K. Kellogg, et al., Federal Telecommunications Law §11.10, at 583 (1992).

(ESPs) from paying interexchange access charges to ILECs.[2] As Kellogg, et al., point out, the issue is whether technology or regulation will give way. The ILECs and long distance carriers argue that technology must give way. The online services sector, independent ISPs, and consumer groups assert that excessive regulation must give way to technological advances. Faced with this question in the past, the Commission has favored the continued advancement of technology. It should not retreat from that position now.

## III. The Regulation of Enhanced Services

The Internet challenges our traditional notions of viewing communications regulation. Contrary to plain old telephone service (POTS), which has been historically a monopoly service, Internet service is provided by thousands of competing firms. Thus, it is not a monopoly service. Internet service falls in the realm of "enhanced services" which are a mixture of "local" and "long-distance" type services provided through "customer premise equipment" (CPE).[3] Enhanced services are distinguished from "basic" telephone services which are limited to switching and transmission.[4] Through the *Computer I, II, and III* proceedings, the Commission has developed a regulatory scheme under which the ILECs are allowed to provide unregulated "enhanced services" through affiliates, in exchange for unbundling their networks and offering the basic elements of service to all competing

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[2] In order to preserve the "financial viability" of ESPs, the Commission preserved the ESP exemption from paying access charges in the 1983. *MTS and WATS Market Structure,* 48 Fed. Reg. 42,984, 42,997 (1983).

[3] Federal Telecommunications Law, §11.7.4, at 567-8.

[4] *Id.*, §11.3, at 547.

providers at tariffed rates. Competing providers are also permitted to interconnect with the public network on the same terms offered to ILEC affiliates.[5]

In its comments, AT&T argues that traffic generated by ESPs should be classified as interstate traffic subject to the Commission's jurisdiction.[6] AT&T asserts that federal regulation over enhanced services, particularly Internet and online services, cannot coexist with state regulation because of the "interstate use or character" of these enhanced services, thus, the "impossibility" doctrine articulated in the *Louisiana PSC* case applies.[7] However, as the Internet Access Coalition pointed out it its comments, in adopting the Telecommunications Act of 1996, Congress codified the Commission's dichotomy between basic and enhanced services. Moreover, the legislature expressly stated that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal and state regulation."[8] Consequently, AT&T's proposal is contrary to the express will of Congress. These arguments bring into focus the observation of Kellogg, et al. quoted in Section II. More importantly, however, the Internet Access Coalition makes the better argument. The Commission should not impose excessive regulation over "enhanced services" which would

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[5] *Id.*, §11.6, at 558.

[6] AT&T Comments at 30-37. Moreover, if the traffic generated by ESPs should now be classified as interstate, then a corresponding change may be needed to the separations process to reflect lessened cost responsibilities on the intrastate part and greater cost responsibilities on the interstate part.

[7] *Id.* at 30.

[8] Internet Access Coalition Comments at 52-3, n. 128.

stand in the way of the continued development of the Internet and other interactive computer services.

## IV. Consumers Are Best Protected by the Continuation of the ESP Exemption

The ILECs and long-distance carriers argue that the ESP exemption should be eliminated. These parties take the position that the ESP exemption is no longer justified, and that the Commission should adopt new ISP TELRIC-based charges that would compensate the ILECs for the investment needed to deploy new packet-switch network technologies that would remove Internet traffic from the PSN.[9] This position, however, is based on flawed assumptions. The first erroneous assumption is that Internet traffic is causing system-wide network congestion and jeopardizing the reliability of the PSN. The second specious assumption is that the ILECs are not being fairly compensated for the Internet traffic that passes through their local telephone networks.

As the ETI study, *The Effect of Internet Use on the Nation's Telephone Network*, clearly shows, these assumptions are unfounded.[10] The ILECs present an inaccurate and

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[9] *See* Joint Comments of Bell Atlantic and NYNEX, at 1-12, and AT&T Comments, at 18-27. *See also* Comments of Alliance for Public Technology, at 4-9. The imposition of interstate access charges on ISP could also negatively impact state efforts to encourage usage of the Internet. Texas, currently, funds a $75 million Telecommunications infrastructure fund to provide Internet access to schools and libraries. Imposition of access charges will make such initiative probability expensive.

[10] The ETI study is included in the Comments of the Internet Access Coalition as Attachment C. It was also filed by the Internet Access Coalition with the Commission in *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry*, FCC No. 96-488 (Dec. 24, 1996).

incomplete assessment of data traffic on their local public switched telephone networks, overstating the costs and congestion, while understating the revenues generated. The ETI study demonstrates that the allegations of congestion are based on anecdotal evidence and worse case scenarios from selected central offices that serve high-volume ISPs.[11] In addition, the ILECs ignore substantial new revenues generated by increased Internet traffic: (1) business lines that many ISPs use to access the network are priced at compensatory rates; (2) ISPs that use high-priced T-1 lines generate substantial income for ILECs; (3) a significant number of ISPs subscribe to vertical services for which ILECs charge a premium; (4) many business (and some residential) users pay usage-sensitive charges for local calls; and (5) growth of Internet and other online services have stimulated tremendous demand for second telephone lines which generated an estimated $1.4 billion for the ILECs in 1995.[12]

TOPUC agrees with the conclusions reached by the ETI Study. The study finds that data communications traffic poses no significant threat to network integrity at the present time. Another important conclusion is that the increase in data communications traffic has produced additional revenues for the local exchange carriers that far exceed their costs in accommodating that traffic. ETI recommends that the long-term solution for accommodating increased data traffic lies in the stimulation of competition and in the deployment of appropriate data-friendly network technologies, and not in the imposition of per-minute "access charges" for use of the current voice-oriented circuit-switched network.[13] In fact, as

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[11] *Id.* at 19-22.

[12] *Id.* at 23-29.

[13] *Id.* at v, 51-52. *See* Internet Access Coalition Comments at 13.

competition develops and draws ISPs away from the ILECs' circuit-switched network to the packet-switched network of new entrants, the PSN congestion problems will largely solve themselves.

Moreover, from the consumer's perspective, it is disingenuous for those parties who are providing or planning to provide Internet services to advocate the elimination of the ESP exemption because the exemption is transparent to all ISPs, and lowers the cost of providing Internet service. Elimination of the exemption would only serve to harm the small providers, who are predominately the independent ISPs, and consumers in general who would have to pay higher rates. Why would any party petition federal regulators to increase the cost of doing business in a competitive industry where the party is a new entrant? This is irrational. Yet, this is what parties, such as AT&T, Bell Atlantic and NYNEX, are doing at the same time that they enter the Internet service market to compete with online services and independent ISPs.

This raises an anticompetitive concern, given the large size of these recent entrants into the Internet service market. If the ESP exemption were eliminated, increasing the cost of providing Internet service, large competitors could squeeze small competitors by temporarily maintaining lower prices while some smaller ISPs pass the added cost to consumer or risk going out of business. The concern is particularly relevant in the case of the ILECs who can use their monopoly market power over local telephony to impede the ability of independent ISPs to compete. Two types of ISPs particularly will be adversely impacted by these efforts: (1) rural area high-cost ISPs, and (2) the numerous start-up ISPs operating in the major metropolitan areas on a non-profit basis. This market power is

already being exhibited by Pacific Bell and Bell Atlantic who are offering Internet service discounts to customer who purchase second telephone lines or ISDN services. Pacific Bell is also proposing to use customer proprietary network information (CPNI) to market unregulated services without furnishing it to competitors. Although Pacific Bell asserts that this practice is not anticompetitive,[14] the Commission should be sensitive to these concerns.

## V. The ILECs Are Responsible for Reliability of PSN

The ILECs agree that the solution to prevent further congestion due to increased Internet traffic is to deploy new packet-switch network technologies that remove Internet traffic from the PSN. However, they take the position that the ISPs should pay in the form of access charges in advance of building the new packet-switch network, and blame Internet traffic for putting in jeopardy the reliability of the PSN.[15] This misguided position assumes that ISPs have control over ILEC decisions regarding the architecture of their public telephone networks. This position is insupportable.

To substantiate their claim, ILECs argue that the growth of the Internet has "dramatically changed the overall usage patterns in many [central] offices," thus "network facilities that were built in contemplation of average traffic volume per line have proved inadequate."[16] The ILECs, however, show no proof to support these allegations. Without such proof, and in light of the well documented ETI study, the ILECs' position must be disregarded. As the Internet Users Coalition pointed out in its initial comments, "[u]sers

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[14] America Online Comments at 37-39.

[15] *See* Joint Comments of Bell Atlantic and NYNEX at 4-12.

[16] *Id.* at 4-5.

should not be made to pay until these data-friendly networks are available from ILECs, at cost based prices."[17] Otherwise, there is no guarantee that revenues generated from data transmission will be devoted to development of such networks.

In the final analysis, ISPs do not have responsibility for assuring the reliability of the PSN. That responsibility falls squarely on the ILECs. In fact, as demonstrated by the ETI study the congestion can be attributed at least in part to the exaggerated role value-of-service pricing plays in traditional telephone rate design by placing a premium on services based on newer technologies, such as ISDN.[18] If the ILECs have concluded that it is necessary to develop packet-switch networks to handle data traffic, in order to assure the reliability of the PSN, then they should build them. The Commission should support this conclusion because it will protect the interests of all consumers.

## VI. Fair and Equitable Access to the Internet

Unlike other "enhanced services", the Internet is unique in the positive impact it is having in advancing social and political discourse in the United States. The Internet has advanced social and political discourse because of its affordable access and open architecture which allows for a diversity of views and interactive exchange of information which are impossible in any other communications medium, such as radio and television broadcasting.[19] It, therefore, has a universal service aspect that cannot be ignored, given §254(b)(2)-(6) of the Telecommunications Act. In the political arena, the Internet, and other interactive

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[17] Internet Users Coalition Comments at 12.

[18] ETI, The Effect of Internet Use on the Nation's Telephone Network, at 14 (1997).

[19] Internet Users Coalition Comments at 9, n.4.

communications services, are reviving democratic politics by: (1) reconnecting the citizenry to the political process; (2) improving voter information; (3) increasing candidate access to the political process; (4) expanding voter alternatives in candidates; and (5) increasing civic participation.[20]

These new interactive technologies have the potential to revolutionize the political process through electronic voting, electronic political fundraising, and electronic initiatives and referendums.[21] However, ensuring fair and equitable access to these new technologies is vital to the integrity of this emerging electoral process.[22] Fair and equitable access to these new technologies for the consumer is the primary principle in a developing an Information Bill of Rights & Responsibilities. The Information Bill of Rights is an attempt at formulating a set of principles as a framework to guide government, business, and citizens through the choices regarding the production, processing, sharing, disseminating, and consumption of information.[23]

In addition to increasing participation in the political process, the Internet has increased social welfare in other areas. The Internet offers varied educational capabilities, entertainment outlets, and commercial applications. Moreover, the Internet is bringing

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[20] The Aspen Institute, Communications and Society Program & American Bar Association, Standing Committee on Elections, Elections in Cyberspace: Toward a New Era in American Politics, at 13 (1996).

[21] *Id.* at 13-17.

[22] *Id.* at 18-20.

[23] The Aspen Institute, Communications and Society Program, Toward an Information Bill of Rights & Responsibilities (1995).

people together by building communities of interest that would not exist otherwise.[24] These "communities of interest" are important to the democratic process because they unite individuals around "common motives", and diminish isolationism.[25] The Commission should be sensitive to these societal and political concerns and assure that its actions result in fair and equitable access to the Internet for all consumers.

## VII. Conclusion

The Internet is the latest "new technology" to run afoul of an old regulatory convention, in this case the ESP exemption. Thus, the Commission is faced with deciding whether "it is technology or regulation that must give way." TOPUC submits that excessive regulation must give way to allow vibrant competition to continue in the market for Internet and other interactive computer services. The imposition of access charges on ISPs would only slow the growth of Internet usage and create delay in construction of data-friend, packet-switch networks. It is ironic that as the FCC is also contemplating reforming access charges to include, possibly, flat-rated charges, such as a channel charge, so as to more closely reflect the increasing amount of data traffic on the PSN. The ILECs are adequately

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[24] For demographics regarding the Internet see Cyber Atlas, available on the World Wide Web at <www.cyberatlas.com>, and GVU's WWW User's Surveys, available on the World Wide Wed at <www.cc.gatech.edu>.

[25] In the *Federalist Papers*, James Madison warned of the dangers to free government posed by "factions", or groups of citizens motivated by particular interests rather than the public interest as a whole. According to Madison, one disadvantage of a large country, such as the United States, was that it inhibited individuals with "common motives" from organizing and acting on their personal interests due to the problems created by geographical distance and limited communications. Communications technologies have eroded some of these barriers throughout the century, and the Internet continues in this tradition. *See* Elections in Cyberspace: Toward a New Era in American Politics, at 30.

compensated for the increased data that passed through their local telephone networks. Internet use is not a source of congestion on the PSN at the present time. It is the responsibility of the ILECs, not ISPs, to assure the reliability of the PSN.

Commission policies must ensure fair and equitable access to the Internet for all consumers. This is important in order to encourage competition, social welfare and political participation, all of which are made possible by affordable access to the Internet. Imposing access charges on ISPs would hinder these objectives.

Respectfully submitted,

Suzi Ray McClellan
Public Counsel
State Bar No. 16607620

Gabriel García
Assistant Public Counsel
State Bar No. 00785461

OFFICE OF PUBLIC UTILITY COUNSEL
1701 N. Congress Avenue, 9-180
P.O. Box 12397
Austin, Texas 78711-2397
512/936-7500
512/936-7520 (Facsimile)